82-1862

No.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

PROSSER'S MOVING AND STORAGE COMPANY,
a Missouri corporation,
*Petitioner,*

vs.

LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES,
ROBERT J. BAKER, HOWARD MCDOUGALL,
*THOMAS F. O'MALLEY and R. V. PULLIAM, Trustees of the*
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS
PENSION FUND,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CHARLES W. BOBINETTE
BRUCE M. WURMSER
KEVIN M. O'KEEFE
UTHOFF, WURMSER, GRAEBER,
BOBINETTE & O'KEEFE
Suite 420
1015 Locust Street
St. Louis, MO 63101
(314) 621-9550
*Attorneys for Petitioner*

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

## QUESTIONS PRESENTED FOR REVIEW

I. When disputed claims involving (1) allegedly delinquent employee benefit trust fund contributions, and (2) the alleged right of fund trustees to audit certain of the employer's records, turn upon interpretations of various provisions of the underlying collective bargaining agreement, and the bargaining agreement requires resolution of all questions of its interpretation under a grievance/arbitration procedure, must the third-party beneficiary fund trustees defer litigation of their claims until arbitration of the questions of interpretation is had between the union and the employer?

II. If, in the foregoing instance, third-party beneficiary fund trustees are not required to defer litigation of their claims pending arbitration, must they, at the least, plead and prove that it would be futile to request the union to properly initiate and pursue arbitration of such questions of contract interpretation?

III. Is the majority opinion below, holding that the trustees need not defer litigation pending arbitration of underlying contractual disputes, consistent with:

(a) The intentions of the contracting parties?

(b) The national labor policy strongly favoring arbitration of labor disputes?

(c) The expeditious and uniform resolution of labor disputes?

(d) The intent of Section 302(c)(5) of the Labor Management Relations Act?

(e) The evolving national pension policy?

IV. Does the need to protect the independence of fund trustees and the possibility that unions will not diligently pursue their contractual claims justify the majority's holding below?

V. If fund trustees request the union to arbitrate underlying contractual disputes and the union refuses or fails to do so, have the trustees fulfilled their fiduciary duties?

## PARTIES

Petitioner, Prosser's Moving and Storage Company, is a Missouri corporation engaged in the public moving business.

Respondents, Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley and R. V. Pulliam, Trustees of the Central States, Southeast and Southwest Areas Pension Fund, comprise all of the trustees of said fund.

The judgment of the court below for which review is sought was a consolidated appeal. The companion case was brought by respondents against Schneider Moving and Storage Company, a *Missouri corporation unrelated to petitioner. Respondents, in* the district court and on appeal, were parties in the companion case in their capacity as trustees of the Central States Southeast and Southwest Areas Health and Welfare Fund, as well as in their capacity as trustees of the pension fund. However, although respondents sued petitioner in the district court in their capacity as trustees of both funds, they appealed only in their capacity as trustees of the pension fund. (A. 40).

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**I. Cases Cited:**

**II. Statutes:**

**III. Report Of Hearings:**

# No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

---

PROSSER'S MOVING AND STORAGE COMPANY,
a Missouri corporation,
*Petitioner,*

vs.

LORAN W. ROBBINS, MARION M. WINSTEAD, HAROLD J. YATES,
ROBERT J. BAKER, HOWARD MCDOUGALL,
THOMAS F. O'MALLEY and R. V. PULLIAM, Trustees of the
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS
PENSION FUND,
*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Eighth Circuit rendered in these proceedings on February 16, 1983.

### OPINIONS BELOW

On November 7, 1980, the Honorable John K. Regan, United States District Judge for the Eastern District of Missouri, Eastern Division, entered his order dismissing respondents' complaint, without prejudice, together with a memorandum of law in support of the order of dismissal. The unreported order, memorandum, and companion memorandum are reproduced at A. 51, A. 41 and A. 46, respectively.

Respondents appealed to the United States Court of Appeals for the Eighth Circuit. On May 24, 1982, a split decision by the three-judge panel reversed the order of the district court and remanded the case for further proceedings consistent with the opinion. The opinions, which were not reported, are reproduced at A. 27 and A. 36. Thereafter, on June 24, 1982, the Court of Appeals granted petitioner's petition for rehearing en banc, as set forth in its unreported order reproduced at A. 26.

On February 16, 1983, the Court of Appeals filed its en banc opinion in this cause, which has not yet been officially reported. The majority and dissenting opinions are reproduced at A. 1 and A. 19, respectively.

## JURISDICTION

The en banc judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 16, 1983. (A. 24).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), for review by writ of certiorari.

## STATUTES INVOLVED

**Title 28, United States Code:**

**§ 1254. Courts of appeals; certiorari; appeal; certified questions**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

**§ 1291. Final decisions of district courts**

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United

States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

**Title 29, United States Code:**

**§ 185. Suits by and against labor organizations**

**Venue, amount, and citizenship**

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

. . .

**§ 186. Restrictions on financial transactions**

**(c) Exceptions**

The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance,

disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; . . .

**§ 1132. Civil enforcement**

**Persons empowered to bring civil action**

(a) A civil action may be brought—

. . .

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

. . .

**Jurisdiction**

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

## STATEMENT OF THE CASE

Respondents, the trustees of two employee benefit trust funds, instituted suit against petitioner, Prosser's Moving and Storage Company (hereinafter "Prosser"), alleging that they were aggrieved because Prosser had violated the 1976 and 1979 collective bargaining agreements entered into with Local Union 610, International Brotherhood of Teamsters, Chauffeurs,

Warehousemen and Helpers of America (hereinafter "the union"), and ancillary pension and health and welfare trust indenture agreements. The trustees based jurisdiction of the district court on Section 301(a) of the Labor Management Relations Act of 1947 ("LMRA"), as amended, 29 U.S.C. §185(a), and Section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1132.

The trustees' complaint alleged that each collective bargaining agreement provided for specific payments to the two trust funds "for each employee covered by said agreement." They sought (1) an accounting as to all employees of Prosser "covered by the collective bargaining agreements" dating back to March 1, 1976; (2) recovery of all sums of money determined to be due after the completion of the accounting, together with interest thereon; (3) specific performance by Prosser to provide the trustees with allegedly required monthly contribution reports; (4) costs attendant to conducting an audit of Prosser's payroll books and records; (5) reasonable attorney's fees; and (6) such other relief as the court deemed just.

Prosser, by its answer, denied the trustees' allegations, including their interpretation of provisions of the collective bargaining agreements, and contended the district court lacked subject matter jurisdiction. Prosser moved to dismiss the complaint on grounds that the matters raised by the complaint involved interpretation of various provisions of the underlying collective bargaining agreements, and were therefore subject to the grievance/arbitration procedure set forth in the agreements.[1] Prosser contended that because the grievance/arbitration procedure had not been undertaken, the court lacked subject matter jurisdiction and the complaint failed to state a claim upon which relief could be granted.

---

[1] Both collective bargaining agreements provided for arbitration of disputes "as to the meaning or application of the provisions of this Agreement."

Specifically, Prosser first contended that the collective bargaining agreements required contributions to be made only for "regular employees" (and then only if they had performed 25 hours of work in a week), and that the collective bargaining agreements expressly excluded required contributions for "part-time," "temporary", "seasonal" and "emergency" employees.[2] Prosser contended that classification of its employees therefore required interpretation of the various categories of employees expressly set forth in the collective bargaining agreements, and was thereby subject to the agreements' grievance/arbitration procedure.

Prosser also claimed that interpretation of the terms of the collective bargaining agreements, and therefore utilization of the grievance/arbitration procedure, was necessary to determine the scope of the trustees' administrative authority, which in turn governed the following matters raised by the complaint:

> (1) Whether the trustees have the right to demand inspection of the employment records of "all employees covered by the collective bargaining agreements," including those categories of employees for whom contributions are expressly excluded;
>
> (2) Whether the trustees have the right to seek to recover contributions, and to inspect records, pertaining to the period prior to February 28, 1979, since the union and employer entered into a new collective bargaining agreement, effective on that date, in reliance upon their understanding and interpretation of the prior agreement and the manner in which contributions were made pursuant thereto; and

---

[2] Each trust indenture required the employer to make contributions as required by the applicable collective bargaining agreement between the parties.

(3) Whether the trustees have the right to seek to recover contributions, and to inspect records, pertaining to the period prior to January 4, 1978, since on that date a union complaint to the National Labor Relations Board, alleging Prosser's refusal to allow an audit of its records, was dismissed by reason of the union's refusal to arbitrate.[3]

The district court sustained Prosser's motion to dismiss for lack of subject matter jurisdiction, dismissing the case without prejudice pending the outcome of arbitration proceedings. (A. 51). In its opinion, the court held that the dispute raised in the trustees' complaint:

> "involves the construction and interpretation of the language of the collective bargaining agreements as to which class of employees are covered thereunder and as to the right of each set of plaintiffs to obtain a court-ordered accounting and audit." (A. 44-45).

The court also held:

---

[3] The trustees derived their authority from the following provision in both collective bargaining agreements, which Prosser claimed needed to be interpreted through the grievance/arbitration procedure:

> "By execution of this agreement, the employer authorizes the Employers' Association which are parties hereto to enter into appropriate trust agreements necessary for the administration of such fund, and to designate the employer trustees under such agreement, hereby waiving all notice thereof and ratifying all actions taken or to be taken by such Trustees within the scope of their authority."

Prosser contended that in each of the three instances enumerated above, the trustees' actions and demands, within the meaning of the foregoing provision, constituted extraordinary matters not "necessary for administration of the fund" and beyond "the scope of their authority." See *Farmer* v. *Fisher*, 586 F.2d 1226, 1230 (8th Cir. 1978) and *Adler* v. *Hughes*, 570 F.2d 303, 307 (10th Cir. 1978).

> "...that unless and until there has been a determination of the disputes relating to the rights of the plaintiffs and the nature and extent of the defendant's obligation under the collective bargaining agreement, the plaintiffs have no standing to sue as alleged third-party beneficiaries." (A. 45).

The district court's decision that litigation of the trustees' claims must be deferred until the questions of interpretation have been resolved under the grievance/arbitration procedure of the contracts was limited to instances where disputes arising out of an interpretation of the contract language were involved. The court noted that not all collection claims must be processed through the grievance/arbitration procedure in that "mere collection matters" were not subject to arbitration.

The trustees of the pension fund[4] appealed to the United States Court of Appeals for the Eighth Circuit, which assumed jurisdiction of the appeal pursuant to 28 U.S.C. §1291. On March 24, 1982, a divided three-judge panel reversed, holding the trustees could sue in the district court without resorting to arbitration. (A. 27). On April 7, 1982, Prosser filed its petition for rehearing en banc, which was granted on June 4, 1982. (A. 26). Oral argument was held on October 13, 1982.

On February 16, 1983, the court's en banc decision reversed the district court, with the majority holding that the trustees did not have to defer their litigation pending arbitration between the union and employer of the underlying contract disputes. (A. 1). Senior Circuit Judge Henley wrote a strong dissenting opinion, joined by Judge John R. Gibson. (A. 19).

---

[4] Although the trustees of both the pension fund and the health and welfare fund were the same individuals, only the trustees of the pension fund appealed the decision rendered in favor of Prosser. See notice of appeal at A. 41.

## REASONS FOR GRANTING THE WRIT

**1. The Majority Decision Below Has Caused A Split Of Authority In The Circuits Resulting In Inconsistent Procedures To Follow Under The Same Or Similar Collective Bargaining Agreements And Trust Agreements As Entered Into By Petitioner.**

Excluding the instant appeal, two circuit courts of appeals have considered the issue of whether or not to stay litigation by fund trustees pending arbitration of underlying collective bargaining contract disputes. Both circuits have determined that it is appropriate to defer litigation until the collective bargaining disputes were resolved by arbitration. *Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin, Inc.*, 625 F.2d 171 (7th Cir. 1980); *Trustees of National Benefit Fund for Hospital and Health Care Employees* v. *Constant Care Community Center,* 669 F.2d 213 (4th Cir. 1982). At least one other district court has also adopted this position. *IBEW* v. *Dave's Electric Service, Inc.*, 382 F.Supp. 427 (M.D. Fla. 1974), *remanded on other grounds,* 545 F.2d 987 (5th Cir. 1977).[5]

In *Howard Martin,* the trust fund sued to collect contributions allegedly owed by an employer under a collective bargaining agreement. As in petitioner's case, the employer denied that contributions were owed and contended: (1) that the language of the collective bargaining agreement was open to dispute as to which workers were covered by the contribution provisions of the agreement; (2) that the dispute was subject to the broad arbitration provisions of the agreement; and (3) that the court

---

[5] Prior to its decision below, the Eighth Circuit had cited *Howard Martin* and *Dave's Electric* with approval in considering issues similar to those involved in the present case. See *Layne-Western Co.* v. *International Union Operating Engineers, AFL-CIO Local Union 513,* 650 F.2d 155, 158 (8th Cir. 1981) and *Farmer* v. *Fisher, supra,* at 586 F.2d 1230.

therefore lacked subject matter jurisdiction because of the failure to submit the matter to arbitration. The Seventh Circuit, in affirming the lower court's dismissal of the action, held that the case turned upon an arbitrable issue of contract interpretation which, until resolved, precluded determination of whether a deficiency existed.

In *Health Care Employees, supra,* 669 F.2d 213, the Fourth Circuit adopted the *Howard Martin* analysis. However, the court refused to defer litigation pending arbitration in the case on grounds that the defendant employer did not raise any substantive contractual defenses which were subject to resolution by arbitration.

The majority decision below held that because a union may not diligently prosecute a dispute in arbitration and because the trust funds must remain independent of exclusive union control, the trustees are not required to request the union to arbitrate contract disputes, but may litigate these disputes with the employer in federal court. In so holding, the Eighth Circuit reversed its decision in *Central States, Southeast and Southwest Areas Pension Fund* v. *CRST, Inc.,* 641 F.2d 616 (8th Cir. 1981) where it had stated, at 617-618:

> "The funds owe their existence to the collective bargaining agreement which requires the employer to contribute an agreed sum only for each employee 'covered' by the agreements. In the event of any dispute between the union and the employer as to whether a particular employee is 'covered', grievance procedures may be utilized. Although, as the district court stated, the funds, which are third party beneficiaries of the agreements, are not authorized to resort to the grievance machinery nor to compel the union to do so on its behalf, it would appear that in the event that a dispute should arise respecting coverage, the duty of fair representation would compel the union to invoke the grievance machinery if the funds were to request such action."

As recognized by Judge Henley in the dissenting opinion below, the majority's concern with the trustees' independence being threatened by having to request the union to arbitrate underlying contractual disputes is hypothetical, unlikely, and based upon the erroneous assumption that the union will not carry out its duty of fair representation. The majority assumption is certainly not warranted by the conduct of the parties in this dispute. (No allegation was made that the union was requested to arbitrate on behalf of the trustees and refused or that it would have been futile to request the union to do so.) To suggest that the trustees have a greater interest than does the union in protecting the interests of the beneficiaries attacks the very underpinnings of the entire labor union movement.

The majority's concern that the trustees could be held liable for breach of fiduciary duty if despite their request, the union failed to properly initiate and pursue arbitration of underlying contractual disputes, begs the question, confuses the trustees' fiduciary duty with strict liability, and conflicts with the analysis of another court of appeals in *Central States, Southeast and Southwest Area Pension Funds* v. *Central Transport, Inc., et al.*, No. 81-1757 (6th Cir., Jan. 20, 1983). There, the Sixth Circuit stated:

> "With respect to the personal liability of the trustees for an alleged breach of fiduciary duty, we note that a trustee may only act within the scope of his or her authority. To the extent that authority is limited by law, as we have found the trustees' ability to investigate and inspect under the statute and contractual provisions is limited in the case on appeal, there can be no breach of duty by the trustees for failing to undertake a more sweeping audit. A trustee may properly rely on limits to his or her authority imposed by the trust agreement and by law." (slip opinion, p. 19).

The majority's holding below is in direct conflict with those of the Seventh and Fourth Circuits on the major issue in the

case, and its analysis of the trustees' duty conflicts with that offered by the Sixth Circuit. While the Eighth Circuit, of course, was not compelled to adopt the positions taken by the other courts of appeals, substantial confusion is bound to result from the split of authority now created, which can only be resolved by this Court.

**II. The Majority Decision Below Affects The Rights And Relationships Of Thousands Of Employers And Local Unions Throughout The United States Who Have Entered Into The Same Or Similar Collective Bargaining Agreements And Trust Agreements As Entered Into By Petitioner.**

Respondents are trustees of two of the largest multi-employer benefit funds in the United States. Central States' pension fund covers almost 500,000 employees, about 13,000 employers and 300 local unions spread throughout 33 states.[6]

Thousands of employers throughout the United States have agreed to contribute to the respondents' funds pursuant to collective bargaining agreements which are the same or similar to the one signed by petitioner. Moreover, an even larger number of employers have agreed to contribute to similar multi-employer Taft-Hartley benefit funds in accordance with collective bargaining agreements which provide for settlement of contractual disputes by arbitration. Because of the number of local unions and employers who will be affected by the Eighth Circuit's decision, it is crucial that this Court eliminate the confusion created by the split of authority.

---

[6] "Teamsters' Central States Pension Fund and General ERISA Enforcement," Hearings Before the Subcommittee on Oversight of the Committee on Ways and Means, House of Representatives, Ninety-Fifth Congress (1st Ses.) March 14, 1977, p. 21; *Central States, Southeast and Southwest Area Pension Fund, et al.* v. *Central Transport, Inc., et al.*, No. 81-1757, (6th Cir., Jan. 20, 1983.), slip opinion, p. 16.

**III. The Majority Decision Below Raises Serious Questions As To The Rights Of Contracting Parties To Exclusively Resolve Disputes Involving The Meaning Of Their Contracts Through The Heretofore Strongly Accepted And Preferred Method Of Arbitration.**

The majority below has carved out a very significant exception to the strong presumption that differences as to the meaning of a collective bargaining agreement should be left to settlement between the union and the employer by way of arbitration. The court's decision places in jeopardy industrial peace and the relationship of employers and local unions throughout the Eighth Circuit, and the United States, who have bargained in good faith and relied upon the decisions of the United States Supreme Court and the Eighth Circuit from 1960 until this point in time.[7]

No longer can the signatory parties be assured that if disputes arise as to the interpretation of the collective bargaining agreement, they will be resolved in one single and familiar forum, the arbitration hearing. Pursuant to the majority decision, an employer can be forced to litigate with a third-party beneficiary trustee the meaning of the terms of its collective bargaining agreement. Thus, it would be unwise for an employer to sign a collective bargaining agreement providing for binding arbitration since the employer could be subjected to inconsistent interpretations and obligations under a single bargaining agreement.

---

[7] See *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); also see *Layne-Western, supra,* 650 F.2d 155 (8th Cir. 1981), *Farmer, supra,* 586 F.2d 1226 (8th Cir. 1978) and *CRST, supra,* 641 F.2d 616 (8th Cir. 1981), *each overruled by the instant case.*

**IV. The Majority Decision Below Raises Serious Questions As To The Efficiency Of Arbitration Versus Litigation, And Will Further Burden The Already Crowded Dockets Of The District Courts.**

As pointed out by Judge Henley in his dissenting opinion, arbitration in this case would promote national labor policy by maintaining industrial peace, avoiding delays, and deferring to the expertise of persons well acquainted with the standards of the industry and the law of the shop. (A. 23). The majority opinion abandons the traditional and correct rationale established by this Court that arbitration is both expeditious and efficient. The litigation which has been mandated by the court below cannot be said to be superior to arbitration. As in this case, for example, litigation has already been time-consuming and costly, and the merits of the matter have not even been reached.

Moreover, the majority decision has far-reaching and serious consequences to the district courts who will have to hear these cases. Although statistics are not readily available, during oral argument before Judge Regan, counsel for the trustees stated that he had filed some eighty cases on behalf of the trust funds in the Eastern District of Missouri alone, each involving alleged delinquent contributions and presenting questions of interpretation of the underlying bargaining agreements. One may presume a similar impact on the other district courts in the Eighth Circuit, and if the majority opinion is followed by other courts of appeals, on district courts in those circuits as well.

## CONCLUSION

In view of the inconsistencies between the majority opinion below and the decisions of other courts of appeals, as well as the serious questions and far reaching consequences presented, petitioner urges this Court to grant its petition for writ of certiorari.

Respectfully submitted,

CHARLES W. BOBINETTE
BRUCE M. WURMSER
KEVIN M. O'KEEFE
UTHOFF, WURMSER, GRAEBER,
BOBINETTE & O'KEEFE
Suite 420
1015 Locust Street
St. Louis, MO 63101
(314) 621-9550
Attorneys for Petitioner

# APPENDIX

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

---

Nos. 80-2116 and 80-2117

---

No. 80-2116

---

Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley, and R. V. Pulliam, Trustees of the Central States, Southeast and Southwest Areas Pension Fund,

Appellants,

v.

Prosser's Moving and Storage Company, a Missouri corporation,

Appellee.

---

No. 80-2117

---

Loran W. Robbins, Marion W. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley, and R. V. Pulliam, Trustees of the Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds,

Appellants,

v.

Schneider Moving and Storage Company, a Missouri corporation,

Appellee.

---

Appeals from the United States District Court
for the Eastern District of Missouri

---

Submitted: October 13, 1982

Filed: February 16, 1983

---

Before LAY, Chief Judge, HEANEY, BRIGHT, and ROSS, Circuit Judges, HENLEY, Senior Circuit Judge, McMILLIAN, ARNOLD, and JOHN R. GIBSON, Circuit Judges, *en banc*.

---

ARNOLD, Circuit Judge.

These cases present important questions of labor law touching on the rights and obligations of trustees of Taft-Hartley Act pension and welfare funds in disputes with employers over their contributions to the funds. The trustees in these cases filed suits as third-party beneficiaries of the collective-bargaining agreements between the employers and the union. The District Court, relying largely on *Central States, Southeast & Southwest Areas Pension Fund* v. *Howard Martin, Inc.*, 625 F.2d 171 (7th Cir. 1980), held in both cases that the trustees were obligated by the collective-bargaining agreements to submit their differences to arbitration. A divided panel of this Court reversed, holding that the trustees could sue in the District Court without resort to arbitration. *Robbins* v. *Prosser's Moving & Storage Co. & Schneider Moving & Storage Co.*, Nos. 80-2116, 80-2117 (8th Cir. March 24, 1982) (per curiam). Because that decision appeared to conflict with prior decisions of this Court, we granted rehearing en banc. We now reverse the District Court and overrule those prior decisions to the extent of any inconsistency with this opinion. Our conclusion is that the national pension policy embodied in the Labor Management Relations Act (LMRA), the Employee Retirement Income Security Act (ERISA), and the Multiemployer Pension

Plan Amendments Act (MPPAA), together with the terms of the collective-bargaining agreement and accompanying trust instruments, dictate that these trustees not be bound by the arbitration procedure, which they have no right to initiate.

I.

The facts of these two cases differ somewhat. The plaintiffs are trustees of the Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund, both of which were established pursuant to §302(c)(5) of the Labor Management Relations Act of 1947 (commonly referred to as the Taft-Hartley Act), 29 U.S.C. §186(c)(5). The complaints, which were filed against Prosser's Moving & Storage Company and Schneider Moving & Storage Company, are based on collective-bargaining agreements between the defendants and Local 610 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

The complaint in No. 80-2117 alleged that Schneider had been a party to successive collective-bargaining agreements with Local 610 from March 1, 1970, through February 28, 1979, which required Schneider to make certain contributions to the Pension Fund and the Health and Welfare Fund for each employee covered by the agreement.[1] According to the complaint, the agreement required contributions to be made by the fifteenth day of each month and obligated Schneider to furnish the trustees with a monthly contribution report containing the names of and hours worked by each employee and the contributions required on behalf of each. The plaintiffs further claimed authorization under the collective-bargaining agreements and the trust agreements to audit the employer's records to determine if all required contributions had been made. Schneider was

---

[1] Jurisdiction was alleged under §301 of LMRA, 29 U.S.C. §185(a), and §502 of ERISA, 29 U.S.C. §1132.

alleged to have violated the agreement by refusing to allow the trustees to audit its payroll records, by failing to furnish the required monthly report, and by repeatedly failing to submit the monthly reports and payments on their respective due dates. Designated Record (D.R.) 3-5. The trustees prayed for an accounting and for all sums determined to be due, together with costs and attorneys' fees as provided in the agreements. D.R. 6-7. The complaint in No. 80-2116 against Prosser was almost identical.

The cases seem to differ in two respects: In February of 1979, a decertification election was held at the Schneider Company, and the Union was decertified as the representative of Schneider's employees. Second, as to the defendant Prosser the real controversy seems to revolve around the trustees' right to conduct an audit of the company's records. Schneider has already submitted to an audit. Schneider has sought to emphasize that its dispute with the plaintiffs is a question of coverage of some employees under the agreement, not the right of the plaintiffs to conduct the audit.

The defendants moved to dismiss both actions on the ground that the controversy should have been submited to arbitration under the terms of the collective-bargaining agreements. The District Court, relying on *Central States* v. *Howard Martin, supra,* agreed with the defendants and dismissed both complaints without prejudice pending the outcome of arbitration. The Court's opinion accepted *Howard Martin's* dichotomy of such suits into "simple collection matters," for which arbitration is not a prerequisite to suit, and more complex actions requiring interpretation of the collective-bargaining contract, in which arbitration is required. Both suits were found by the District Court to involve questions of coverage of certain employees under the agreement and therefore held to present questions of contract interpretation.

## II.

Defendants' argument for compulsory arbitration is based on provisions in the collective bargaining contract, on the national labor policy favoring arbitration embodied in the *Steelworkers Trilogy,*[2] and on precedent. Close examination reveals that none of these supports will bear the weight of the defendants' position. Moveover, other important considerations, which we will discuss presently, militate against requiring arbitration.

### A.

First, Prosser and Schneider contend that since the plaintiffs sue as third-party beneficiaries of the union contract, they should be bound by the grievance-arbitration procedures contained in the contract. The argument is based on traditional notions of third-party-beneficiary contract law: The third party seeking to enforce the agreement is bound by the terms of the contract and subject to teh same defenses as the original promisee would be. Defendants are correct as a general proposition that "[t]he promisor may . . . usually assert against the beneficiary any defense which he could assert against the promisee if the promisee were suing on the contract." Calamari & Perillo, *Contracts* 623 (2d ed. 1977). This rule is, however, not without exception, and the Supreme Court has held collective-bargaining agreements to be such an exception. *Lewis* v. *Benedict Coal Corp.,* 361 U.S. 459 (1960), was a suit by pension-fund trustees seeking to compel an employer to contribute to the fund. The issue before the Supreme Court was "whether the agreement is to be construed as making performance by the union [which had been made a third-party defendant] of its promises a condition precedent to Benedict's promise to pay royalty to the trustees." *Id.* at 465. The Court held

---

[2] *Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564 (1960); *Steelworkers* v. *Warrior & Gulf Nav. Co.,* 363 U.S. 574 (1960); *Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (19160).

that collective-bargaining agreements are not typical third-party-beneficiary contracts and rejected Benedict's assertion, noting that "[i]f Benedict and other coal operators having damage claims against the union for its breaches may curtail royalty payments, the burden will fall in the first instance upon the employees and their families across the country." *Id.* at 469.[3]

While *Lewis* is arguably distinguishable from the instant case in that it dealt with a proffered substantive defense to the suit rather than the procedural defense of arbitration, the case is recognized as establishing an exception to the general rule that defenses good against the promisee are good against donee beneficiaries such as the Funds. Calamari & Perillo, *supra,* at 624 n.26. See also *Todd* v. *Casemakers,* 425 F. Supp. 1375 (N.D. Ill. 1977); *Wishnick* v. *One Stop Food & Liquor Store,* 359 F. Supp. 239 (N.D. Ill. 1973). And while *Lewis* alone may not be dispositive of Schneider's and Prosser's cases, it does refute their argument that the trustees, as third-party beneficiaries, are subject to the same defenses as could be asserted against a suit by the union.

B.

Second, defendants argue that the well-established national policy favoring arbitration as a means of resolving labor disputes compels the conclusion that arbitration is required in disputes such as these. The *Steelworkers Trilogy, supra,* is cited

---

[3] The Court also expressed its concern, in words that are apt in the present context, with "protecting the interests of beneficiaries of the welfare fund, many of whom may be retired, or may be dependents, *and therefore without any direct voice in the conduct of union affairs.*" *Id.* at 470 (1960) (emphasis added). It would be unjust and contrary to the national labor policy, the Court reasoned, to reduce a recovery in favor of beneficiaries of a fund by reason of some default on the part of the union. "[T]he fund is in no way an asset or property of the union." *Id.* at 465.

as favoring arbitration of all industrial labor disputes. The defendants, however, overlook certain limitations inherent in the Court's decisions in those cases. First, as Justice Douglas pointed out, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. at 582. The arbitral process is, moreover, part of the collective-bargaining process. *Steelworkers* v. *American Mfg. Co.*, 363 U.S. at 570 (Brennan, J., concurring). The arbitration clause and the "no strike" clause are generally each *quid pro quo* for the other. *Id.* at 567. And, as we shall explain, other important policies, such as the enforcement of federal statutory rights, may in a particular case have to be balanced against the policy favoring arbitration.

We recognize that defendants' position has support in past decisions of the Seventh Circuit and of panels of this Court. This very type of dispute has been held subject to arbitration by the Seventh Circuit in *Central States* v. *Howard Martin, supra.* The facts in *Howard Martin* are essentially the same as in Schneider's case. The opinion divides such suits into "simple collection matters," in which arbitration is unnecessary, and all those others in which some issue of contract interpretation is raised in defense. The precise meaning of the phrase "simple collection matters" is unclear, but it seems to mean something like cases of clear liability. See *Health Care Employees* v. *Constant Care Community Health Center,* 669 F.2d 213, 215 (4th Cir. 1982) (adopting the *Howard Martin* dichotomy but refusing arbitration where no substantive contractual defense was raised). The *Howard Martin* court, sensitive no doubt to the objection that the trustees have no right to invoke arbitration, replied that

> [t]o trigger the arbitration process, the Funds need only inform the Union, the members of which the Funds exist to serve, that Martin disputes the coverage of certain workers and ask the Union, the organization of primary interest, to file a grievance against Martin.

*Central States, Southeast & Southwest Areas Pension Fund* v. *Howard Martin, Inc., supra,* 625 F.2d at 173 (footnote omitted).

The defendants also aptly cite *Farmer* v. *Fisher,* 586 F.2d 1226 (8th Cir. 1978), in which three union-appointed trustees brought an action in a district court to secure the appointment of "an impartial umpire" under §302(c)(5)(B) of the LMRA, 29 U.S.C. §186(c)(5)(B), to break a deadlock between them and the three employer-appointed trustees. The deadlock was over whether the trust should sue the employer to collect certain allegedly delinquent contributions. The question of delinquency *vel non* depended on interpretation of the collective-bargaining agreement. The district court appointed the impartial umpire as requested, but this Court reversed. It held that questions of contract interpretation had to be resolved by the arbitration procedure set forth in the collective-bargaining agreement. The very trust agreement involved provided that "[n]o dispute or question arising under this Trust . . . shall be subject to the grievance or arbitration procedure provided for in any collective bargaining agreement." *Id.* at 1228. But the Court nevertheless held that arbitration was required, on the ground that the case did not involve trust "administration," as contemplated by the LMRA's deadlock provision, but rather an extraordinary, non-trust issue of contract interpretation. Foreshadowing the *Howard Martin* distinction, the Court said that "[t]he right of trustees as a body to sue for contributions under other circumstances, as, for example, where the right to contributions is undisputed, is not before us." *Id.* at 1229 n.4. The only effect of the decision, it was said, was to change the initial forum in which the trust's rights would be decided from a court to an arbitration proceeding. No substantive rights of trustees or beneficiaries would be affected.

Similarly Prosser emphasizes, and quite properly, this Court's decision in *Central States, Southeast & Southwest Areas Pension Fund* v. *CRST,* 641 F.2d 616 (8th Cir. 1981).

There the Court affirmed the dismissal of a suit by trustees to compel inspection of employment and earnings records of all the employees of CRST. The trustees were entitled to see only the records of covered employees, the Court said, as that term is defined in the collective-bargaining agreement, and if a dispute arises as to who is covered, the grievance and arbitration procedure provided in that agreement should be used. The Funds have no right to invoke those procedures, but "it would appear that in the event a dispute should arise respecting coverage, the duty of fair representation would impel the Union to invoke the grievance machinery if the Funds were to request such action." *Id.* at 618.

Also part of this line of authority is *Layne-Western Co. Inc.* v. *Int'l Union of Operating Eng'rs,* 650 F.2d 155 (8th Cir. 1981), which holds, relying on *Howard Martin* and *Farmer* v. *Fisher, supra,* "that the issue of whether contributions are due to the funds for certain types of work performed under the collective bargaining agreements . . . presents a question of interpretation of the collective bargaining agreement and therefore an issue for the arbitrator." *Id.* at 158. *Layne-Western* is not so closely in point as *Howard Martin, Farmer* v. *Fisher,* and *CRST.* It was not an action by trustees against the employer to collect contributions claimed to be delinquent. It was a suit by the employer against the union to enjoin a strike called to protest the company's failure to make certain disputed payments. There was not even a potential divergence between the views and interests of the trustees and those of the union. It was clear that the union, which had gone to the length of striking over the issue, could be depended on to pursue arbitration vigorously, if that should turn out to be the indicated remedy. In addition, the Court stressed that once the arbitrator had determined what work was covered under the contract the trustees would have a right to "audit the appropriate payroll records of any Employer." *Id.* at 158 n.4.

There is no doubt that these cases support defendants' position. *Farmer* and *Layne-Western,* if not *CRST,* are closely in point and would normally govern our conclusion. On reflection, however, we believe that they were not correctly decided. *Stare decisis* is an important aspect of the judicial process, but sometimes it is more important to be correct than to be consistent. After carefully considering the implications of several recent cases, all of them decided after *Howard Martin,* and after analyzing the relationship between unions and §302(c)(5) funds, we are convinced that we should depart from the panel opinions described above.

C.

The national pension policy embodied in §302(c)(5), of the LMRA, 29 U.S.C. §186(c)(5), in the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§1001 et seq., and in the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. 96-364, 94 Stat. 1295, 29 U.S.C.A. §§1132a et seq. (1976-81 Supp.), confers statutory rights on beneficiaries of funds like those that brought this case. Although these rights of course originate in the private contract between union and employer, Congress has chosen to give them considerably more protection than the traditional state-law action for breach of contract would afford. Recent Supreme Court cases illuminate the nature of this protection and underscore the important differences between unions and trust funds.

In *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981), the Court emphasized that ERISA codified the trustee's obligations at common law:

> ERISA essentially codified the strict fiduciary standards that a §302(c)(5) trustee must meet. See 29 U.S.C. §1002(1) & (2) . . . Section 404(a)(1) of ERISA requires a trustee to "discharge his duties . . . solely in the interest of the participants and beneficiaries . . .." [citations omitted]. Sec-

> tion 406(b)(2) declares that a trustee may not "act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. §1106(b)(2).

*Id.* at 332-33. The incorporaton of common-law principles into the statute was further described in Justice Stewart's opinion for the Court:

> Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. Restatement (Second) of Trusts §170(1) (1957); 2 A. Scott, Law of Trusts §170 (1967). To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalty must be enforced with "uncompromising rigidity." *Meinhard* v. *Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (Cardozo, C.J.).

*Id.* at 329.

The question presented in *Amax* was whether employer-appointed trustees of a §302(c)(5) fund were "representatives" of the employer "for the purposes of collective bargaining or the adjustment of grievances" within the meaning of §8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. §158(b)(1)(B). The union had struck in an attempt to get the employer to continue contributing to national trust funds for the benefit of employees. The company wanted to establish its own trust fund for the employees at one of its mines, and to name the management trustees of that fund. The national funds, on the other hand, were contributed to by many employers. Amax, as a member of the Bituminous Coal Operators Association, had had a voice in selecting the management trustees of the national funds, but if its contributions were to go to a separate, one-mine fund, it alone would select all the

management trustees of that fund. Amax claimed that the union's efforts were an unfair labor practice under §8(b)(1)(B), on the theory that trustees were collective-bargaining representatives of management, and that the union was trying to coerce Amax in the selection of these representatives. The Court rejected this argument. It noted that "nothing in the language of §302(c)(5) reveals any congressional intent that a trustee should or may administer a trust fund in the interest of the party that appointed him . . .." 453 U.S. at 330. It stressed the separateness of the fund and its trustees from both the union and the employer. And it referred approvingly to the following remarks by one of the two sponsors of §302(c)(5):

> Senator Ball stated that "all we seek to do by [§302(c)(5)] is to make sure that the employees whose labor builds this fund and are really entitled to benefits under it shall receive the benefits; that it is a trust fund, and that, if necessary, they can go into court and obtain the benefits to which they are entitled." 93 Cong. Rec. 4753 (1947) . . ..

*Id.* at 331.

We also find language in *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982), of some relevance. There, the Court referred to the MPPAA, which added a new Section 515 to ERISA, 29 U.S.C.A. §1145 (1976-81 Supp.), reading as follows:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

*Id.* at 86 (footnote omitted). The Court referred to a passage from the legislative history of this new section:

> The provision which was eventually enacted as [§515] was added to S. 1076 by the Senate Committee on Labor and Human Resources. The Committee explained that the pro-

> vision was added because "simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses *unrelated* to the employer's promise and the plans' entitlement to the contributions," and steps must be taken to "simplify delinquency collection." Senate Committee on Labor and Human Resources, S.1076—The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong., 2d Sess., 44 (Comm. Print, Apr. 1980) (1980 Senate Labor Committee Print) (emphasis added). During floor debate, Senator Williams and Representative Thompson explained the purpose and meaning of [§515] in the same language used in the Senate Labor Committee Print.

*Id.* at 87 (footnote omitted). The disapproving reference to what complicated defenses raised by employers have done to "simple collection actions" is striking in light of the *Howard Martin* court's use of the same phrase.[4]

---

[4] The quoted Senate Committee print also states that "[r]ecourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly." Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess. 44 (Comm. Print 1980). In the House, moreover, Representative Thompson, Chairman of the Committee on Education and Labor and floor sponsor of the House companion bill, stated: "Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and *without regard to issues which might arise under labor-management relations law - other than 29 U.S.C. 186*," the provision making certain employer payments to labor organizations illegal. 126 Cong. Rec. 23039 (1980) (emphasis added).

*Kaiser* had to do with the employer's right to assert, in a court action brought by trustees, the defense of illegality. We quote the legislative history of MPPAA here simply to demonstrate Congress's recently expressed resolve to facilitate efforts by trustees to enforce employers' obligations. Issues of arbitrability can be quite complex, and allowing them to be injected into trustees' collection suits can frustrate this legislative purpose.

The Court recently underscored again the importance of the funds' independence from the union, and the distinctions between the union's interests and those of the beneficiaries. In *United Mine Workers of America Health & Retirement Funds* v. *Robinson*, 102 S. Ct. 1226 (1982), the following description appears of §302(c)(5):

> The section was meant to protect employees from the risk that funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes or even to the private benefit of faithless union leaders. Proponents of this section were concerned that pension funds administered entirely by union leadership might serve as "war chests" to support union programs or political factions, or might become vehicles through which "racketeers" accepted bribes or extorted money from employers.

*Id.* at 1232. The Court also remarked, *id.* at 1233, that "potential beneficiaries [of §302(c)(5) funds] are [sometimes] not members of the bargaining unit" that the union is obligated to represent. "[F]ormer members and their families may suffer from discrimination . . . because the union need not 'affirmatively . . . represent [them] or . . . take into account their interests in making bona fide economic decisions in behalf of those whom it does represent.' *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20." *Id.* at 1233-34 (footnote omitted).[5]

---

[5] The following passage from *Allied Chemical, supra*, 404 U.S. at 181 n.20, quoted with approval in *Robinson, supra*, 102 S. Ct. at 1234 n.14, is also significant:

> Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. See generally Note, 70 Col. L. Rev. 909, 916-920 (1970). The retiree, moreover, would have a federal remedy under §301 of the Labor

The Supreme Court has, moreover, recently reemphasized that certain statutory labor rights, for example rights under the Fair Labor Standards Act, are not subject to waiver under a grievance-arbitration clause. *Barrentine* v. *Arkansas Best Freight System,* 450 U.S. 728 (1981). Although *Barrentine* involved a different right from those under consideration here, it at least shows that the presumption in favor of arbitration is not, of itself, sufficient to place statutory rights or obligations, such as those imposed on trustees and employers by ERISA and MPPAA, under the arbitral process. *Cf. Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974) (Title VII cause of action not subject to arbitration).

The notion of nondelegability and non-waiver of the trustees' responsibilities has also received pointed support in the Third Circuit's recent decision in *Rosen* v. *Hotel & Restaurant Employees,* 637 F.2d 592 (3d Cir. 1981). *Rosen* is particularly important because of the difficult, if not untenable, position in which it would placed the trustees if *Howard Martin* were followed. In that case a retired employee sued his union and the pension fund to recover his pension under the collective bargaining agreement. The fund asserted that Rosen did not have the required years of credited service because his employer had failed to make contributions for some years of his employment. The Court of Appeals held Rosen entitled to a pension because the trustees had a fiduciary obligation to notify him, as a future beneficiary of the fund, that his pension was in jeopardy by reason of his employer's failure to contribute. The court

---

Management Relations Act for breach of contract if his benefits were unilaterally changed. See *Smith* v. *Evening News Assn.,* 371 U.S. 195, 200-201 (1962); *Lewis* v. *Benedict Coal Corp.,* 361 U.S. 459, 470 (1960).

This reasoning would be rendered nugatory by a rule of law that makes trustees' access to the courts subject to an effective veto by the union.

found this duty in the trustees' common-law obligations, as codified in ERISA.[6] Crucial to the present discussion was this statement by the Third Circuit:

> In addition, defendants' status as fiduciaries requires them to take action against employers who fail to contribute to the fund as required by the plan. This obligation could require the trustees to commence suit, or to picket the non-contributing employer; but some action must be taken to safeguard beneficiaries' credited service.

*Id.* at 600. It seems that the trustees of Taft-Hartley pension funds are in danger of being whipsawed by the decisions in *Rosen* and *Howard Martin*. In the Third Circuit they are under a probable duty to sue for delinquent contributions, and in the Seventh Circuit they are prevented from doing so in many cases.

D.

We do not claim that these recent Supreme Court opinions require us to depart from our prior panel opinions, or that *Rosen* is logically irreconcilable with them. The cases we have summarized all arose in different contexts, and none of them focused on the precise question presented here. But they are suggestive enough to raise serious questions about the rationale of *Farmer, CRST,* and *Layne-Western*. Basically, those cases say fund trustees can easily get the union to pursue arbitration, or sue it for not doing so. We cannot agree that unions can be expected to act so readily in the funds' interests.

The union's and the funds' interests will not always be in harmony. The union's primary interest, and properly so, is in keeping as many of its members as possible working, with the best possible wages and working conditions. Arbitration costs

---

[6] In so holding, the Third Circuit relied on our decision in *Phillips v. Kennedy*, 542 F.2d 52, 55 n.8 (8th Cir. 1976).

money, and the union may have better or more pressing uses for its limited funds.[7] It may not wish to bear its half of the cost of an arbitration proceeding. In addition, the pressing of a claim for, say, an audit of the employer's books may irritate the employer in a way incompatible with the union's own legitimate goals. A pension-fund claim can result in a liability of many thousands of dollars for the employer. The union may prefer for that money to be available to pay the wages of its members who are now working, rather than to support former employees, or the families of deceased former employees. Worries about the present are for most union members (and for most other people, too) more pressing than worries about the future. The union may be inclined to trade off a potential pension-fund claim against some other bone of contention in its relations with the employer. And such a decision may be completely legitimate. In order to succeed in a suit against a union for an alleged breach of the duty of fair representation, the trustees would have to show something more than a mere refusal to take an arguably meritorious pension or welfare claim to arbitration. "[A] union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration." *Vaca* v. *Sipes*, 386 U.S. 171, 192 (1967). As the Supreme Court has held, moreover, *Allied Chem. & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, *supra*, the union has no affirmative duty to represent those who are no longer members. It may not even (as in Schneider's case) represent the employer's current employees. Defendants suggest that the trustees, in addition to asking the union to invoke arbitration, could also seek administrative or criminal remedies, but those avenues are even

---

[7] In Prosser's case the union on one previous occasion refused to arbitrate a trust-fund claim arising under the 1976 collective-bargaining agreement, even though the employer requested arbitration. We do not know why. It its motion to dismiss in the District Court, Prosser's claimed, *inter alia*, that this union conduct should estop the trustees to inspect records for the period in question.

more remote and uncertain than the second-hand access to arbitration that is put forward as the funds' main recourse.

The union and a pension fund are both fiduciaries. But they represent groups and interests that only partly coincide. We conclude that the national pension policy described above, and the rights of plan beneficiaries, can be vindicated as Congress seems to have intended only if trustees are given a direct right of access to the courts.

III.

Certainly it is true that arbitration, pension funds, and health and welfare funds, are all matters of contract. They either exist or not as the parties have agreed in the collective-bargaining contract and related documents. If the agreements in the cases before us provided in express words that trustees' claims could not come to court before questions of contract interpretation had been settled by arbitration, this would be quite a different case. But they do not. In fact, Article III, §5 of both trust indentures give the trustees the right to "examine pertinent records of each employer . . . whenever such examination is deemed necessary or advisable by the Trustee in connection with the proper administration of the trust," and Article III, §4, reads as follows:

> [the] Trustees shall take such steps, including *institution and prosecution of,* and intervention in, any *legal proceedings* that the Trustees in their discretion deem in the best interest of the fund to effectuate the collection or preservation of contributions or other amounts which *may be* owed to the trust fund, without prejudice, however, to the rights of the Union to take whatever steps which may

be deemed necessary for such purposes." (emphasis supplied).[8]

Whatever else may be said about these provisions, one thing is clear: they do not unambiguously subject the trustees' rights and obligations to the union's privilege of invoking the arbitration process under the collective-bargaining agreement. The union may choose to assist the funds by invoking this process. Our holding in no way obstructs that alternative avenue of redress. Nor need we decide in the cases before us how to accommodate the judicial and arbitral processes and their results if both are invoked with respect to the same pension or welfare claim.[9] We hold only that the trustees may come into court without first getting the union to invoke the machinery of arbitration. To the extent that *Farmer, Layne-Western,* and *CRST* are inconsistent with this holding, they are overruled.

We leave all other questions, including possible defenses of waiver, estoppel, laches, and limitations, to the District Court for exploration on remand. The judgments are reversed, and the causes remanded for further proceedings consistent with this opinion.

It is so ordered.

HENLEY, Senior Circuit Judge, with whom JOHN R. GIBSON, Circuit Judge, joins, dissenting.

---

[8] The arbitration clause in the collective-bargaining agreements applies "should difference arise between the Company *and the Union* or any employee of the Company as to the meaning or application of the provisions of the Agreement." (Emphasis ours.)

[9] There may be some danger that courts will interpret agreements in a way different from arbitrators. We note, however, that courts are permitted to consider the reasoning of arbitration panels that have previously interpreted provisions similar to the ones *sub judice*.

> Today the court makes bad law.[1] It unnecessarily overrules three prior decisions of this court, rejects the reasoning of the Seventh Circuit in *Martin* and erodes the pronouncements of the Supreme Court in the *Steelworkers Trilogy*. Its decision may be perceived as doing disservice to the national policies of maintaining industrial peace, avoiding delay and deferring to the expertise of persons acquainted with industry standards and the law of the shop.

In prior decisions, this court has concluded that trust fund disputes requiring interpretation of collective-bargaining agreements initially should be submitted to arbitration.[2] *Lange-Western Co.* v. *International Union of Operating Engineers*, 650 F.2d 155 (8th Cir. 1981); *Farmer* v. *Fisher*, 586 F.2d 1226 (8th Cir. 1978); *see Central States, Southeast & Southwest Areas Pension Fund* v. *CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981); *see also Health Care Employees* v. *Constant Care Community Health Center, Inc.*, 669 F.2d 213 (4th Cir. 1982); *Central States, Southeast & Southwest Areas Pension Fund* v. *Howard Martin, Inc.*, 625 F.2d 171 (7th Cir. 1980); *International Brotherhood of Electrical Workers* v. *Dave's Electric Service*,

---

[1] No effort is made to qualify the decision as falling either within or beyond any of the "bad law" categories mentioned by Justice Rehnquist in his dissent in *Larkin* v. *Grendel's Den, Inc.*, 51 U.S.L.W. 4025, 4028 (U.S. Dec. 13, 1982).

[2] In contrast, cases involving matters of trust fund administration, such as collection actions, need not be submitted to arbitration. *E.g.*, *Layne-Western Co.* v. *Int'l Union of Operating Eng'rs*, 650 F.2d 155, 158 (8th Cir. 1981). Since such disputes do not require the interpretation of a collective-bargaining agreement, the policies justifying deferral to arbitration are largely inapplicable.

*Inc.*, 382 F. Supp. 427, 433 (M.D. Fla. 1974), *remanded on other grounds*, 545 F.2d 987 (5th Cir. 1977). The court rejects the reasoning of these cases, holding instead that benefit fund trustees may initiate suit in federal court without resort to arbitration, even where the dispute in question involves issues of contract interpretation. I cannot agree with this departure from precedent.

We are told that in the *Prosser* case the basic question may be the right of the trustees to an audit of company accounts to determine whether appropriate payments have been made, but that Schneider has submitted to audit and that the basic question raised relates to coverage. However, the reach of the court's opinion is not narrowed to audit issues, and it seems clear that in essence the underlying dispute in the cases at bar concerns the coverage of certain employees, for purposes of contribution, under the collective-bargaining agreements.[3] This issue, to be properly answered, requires resort to and interpretation of those contracts, and, therefore, under the terms of the agreements must be submitted to arbitration.[4]

---

[3] Both suits were found by the district court to involve questions of coverage of certain employees.

[4] The collective-bargaining agreements at issue provide the dedfinition of the term "covered employees"; indeed, this term is not defined in any of the ancillary documents. The agreements also provide a grievance-arbitration mechanism "should differences arise between the Company and the Union or any employee of the Company as to the meaning or application of the provisions of the Agreement." This provision is sufficiently broad to encompass the underlying dispute — employee coverage — in the instant cases. *See Steelworkers Trilogy*, *infra* note 5 (in light of national policy favoring arbitration, general arbitration provisions are to be broadly construed).

In the *Steelworkers Trilogy*[3], the Supreme Court articulated the strong federal policy favoring arbitrability of labor disputes. This policy, based upon the national goal of industrial peace, *see, e.g., Gateway Coal Co.* v. *United Mine Workers,* 414 U.S. 368, 377-79 (1974), provides an efficient and expeditious means of dispute resolution in the labor context, utilizing impartial arbitrators possessing specialized knowledge with respect to the industry and issues involved. In my view, this presumption of arbitrability is applicable to the basic dispute from which these appeals stem.

The court, in reaching a contrary result, relies in large part upon recent Supreme Court decisions in the area of national pension policy. Although these opinions do discuss differences between unions and trust funds in this context, the majority concedes, *ante,* at 16, that the decisions do not compel departure from the prior panel opinions of this court. Indeed, there is nothing in the cited decisions, or the references to legislative history there included, that persuades me to abandon the traditional policy favoring the arbitration of disputes concerning the interpretation of collective-bargaining agreements. Nor do I believe that continued adherence to this policy in present context conflicts to any significant degree with the independence or obligations of the benefit fund trustees. The independence of the trustees is adequately protected not only by case law but also by the mandates of the LMRA and ERISA; further, if after the trustees have requested arbitration the union does not pursue that remedy, or fails to act in the best interest of the fund beneficiaries, the trustees are free to seek redress in the courts.

---

[3] *United Steelworkers of America* v. *American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

It is to be remembered that the unions have a duty of fair representation which impels them to invoke the grievance machinery in appropriate circumstances, *Central States, Southeast & Southwest Areas Pension Fund* v. *CRST, Inc.*, 641 F.2d at 618, and this court should not presume a violation of that duty.[6] Rather, it should reject hypothetical and unlikely threats to the independence of the trustees and require the parties first to resort to arbitration, where the law of the shop and the terms of the collective-bargaining agreements may best be interpreted. One need not be clairvoyant to foresee that the spirit of negotiation and compromise that forms the basis for such agreements might be seriously compromised if the parties become aware that the terms of the agreements might be safely ignored or interpreted initially other than through the arbitration machinery.

Absent some reasoning more compelling than that which the court has been able to muster, I am unable to justify, much less to join in, its decision.[7] Accordingly, I dissent.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

---

[6] It is, of course, somewhat troubling that the union was apparently decertified as the employees' representative in No. 80-2117. However, the union still exists, as does its duty of fair representation, and as noted, the trustees would be free to seek judicial redress should resort to arbitration prove unsuccessful.

[7] Since the instant appeals were submitted, the Sixth Circuit has filed its opinion in *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, No. 81-1757 (6th Cir. Jan. 20, 1983). To the extent that the considerations in *Central Transport* parallel those raised here, the views expressed in this dissent appear to be consistent with the reasoning employed by the Sixth Circuit.

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1982

No. 80-2116

Loran W. Robbins, et al,
Appellants,

vs.

Prosser's Moving and Storage Company, etc.,
Appellee.

No. 80-2117

Loran W. Robbins, et al,
Appellants,

vs.

Schneider Moving & Storage Company, etc.,
Appellee.

**JUDGMENT**

(Filed March 14, 1983)

Appeals from the United States District Court for the Eastern District of Missouri.

These appeals from the United States District Court were submitted on the record of the said District Court, briefs of the parties, and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in these causes be, and the same is hereby, reversed and remanded to the said District Court for proceedings consistent with the opinion of this Court.

February 16, 1983

A True Copy:

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term 1981

Nos. 80-2116/2117

Loran W. Robbins, et al,
Appellants,

vs.

Prosser's Moving and Storage Co.,
Schneider Moving andStorage Co.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Petitions of appellees for rehearing en banc filed in these causes having been considered, together with response of appellants thereto, it is now here ordered by this Court that the petition for rehearing en banc be and is hereby granted.

June 4, 1982

## APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

---

No. 80-2116

---

Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley and R. V. Pulliam, Trustees of the Central States, Southeast and Southwest Areas Pension Fund,

Appellants,

v.

Prosser's Moving and Storage Company, a Missouri corporation,

Appellee.

---

No. 80-2117

---

Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley and R. V. Pulliam, Trustees of the Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds,

Appellants,

v.

Schneider Moving and Storage Company, a Missouri corporation,

Appellee.

---

Appeals from the United States District Court
for the Eastern District of Missouri

---

Submitted: September 16, 1981

Filed: March 24, 1982

---

Before BRIGHT, HENLEY and ARNOLD, Circuit Judges.

---

PER CURIAM.

These appeals are from the district court's orders dismissing appellants' complaints without prejudice pending the outcome of arbitration proceedings. The gravamen of the complaints is that appellees have failed to accurately report and remit Benefit Fund contributions for all employees covered by various collective bargaining and other ancillary agreements which establish two employee benefit plans. The complaints also prayed, *inter alia,* for an accounting as to the hours worked and wages received by the appellees' employees in order to determine the amounts of employer contributions due to the two Funds, for payment of the amounts determined to be due the Funds, with interest, and for specific performance of the obligations undertaken by the appellees as a result of their execution of the collective bargaining and ancillary agreements.

The underlying dispute involves the interpretation of the definitions of certain classes of employees for contribution purposes. To the extent that these classes are defined, the definitions appear to be set out solely in the collective bargaining agreements.

Appellees denied the allegations contained in the complaints, and each moved to dismiss the complaints on the grounds that the district court lacks subject matter jurisdiction, and that the complaints fail to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b). The thrust of their arguments is that the Trustees have neither a statutory nor a contractual right to the prayed-for relief without prior determination of their obligations through use of the grievance-

arbitration proceedures provided by the collective bargaining agreements.

The district court entered orders dismissing the complaints without prejudice pending the outcome of arbitration proceedings, and this appeal followed. We have jurisdiction over these appeals pursuant to 28 U.S.C. § 1291. *See United Steelworkers of America, AFL-CIO* v. *Blac, Sivalls & Bryson, Inc.*, 608 F.2d 303, 304 (8th Cir. 1979).

After a careful examination of the nature of the complaints and of the underlying agreements, we reverse the district court's orders and remand these cases for further proceedings not inconsistent with this opinion.

Appellants are Trustees of the Central States Health and Welfare and Pension Funds. These Funds are employee benefit plans within the meaning of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* (ERISA) and the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.* (LMRA). The Funds are also common law trusts established, respectively, in 1950 and 1955 by written Trust Agreements and Declarations of Trust executed by employer groups whose member companies are engaged in the trucking industry, and by organizations composed of various local Teamsters Unions.

Appellee Schneider Moving and Storage Company (Schneider) is a Missouri corporation engaged in the business of public moving and is an employer and a party in interest in an industry affecting commerce within the meaning of ERISA and the LMRA. From March 1, 1970 through February 28, 1979, Schneider was a party to three successive Master Agreements executed by the Public Movers' Association of Greater St. Louis and Local Union 610 (the Union), affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. In addition, Schneider executed a "Joint Application" and a "Participation Agreement" as required by the collective bargaining agreements. By executing

these documents, Schneider agreed to make contributions to the Health and Welfare Fund, and to the Pension Fund.

In February of 1979, a decertification election was held, and the Union was described as the representative of Schneider's employees.

Appellee Prosser's Moving and Storage Company (Prosser) is a Missouri corporation engaged in the business of public moving, and is likewise an employer and a party in interest in an industry affecting commerce within the meaning of ERISA and the LMRA. From March 1, 1976 through February 28, 1979, Prosser, like Schneider, was a party to a collective bargaining agreement. Prosser also executed a Participation Agreement, whereby it agreed to make contributions to the Pension Fund as required by the collective bargaining agreement. Furthermore, on or about March 1, 1979, Prosser entered into another collective bargaining agreement with the Union, to be effective through February 28, 1982.

The collective bargaining agreements mentioned above provide the definitions whereby a particular employee's eligibility for coverage is determined, and delineate the annual amounts to be contributed by each employer to the Funds on behalf of each of their covered employees. The health and welfare and pension provisions of these agreements further provide that the employer, by executing the agreements, authorizes the execution of the Trust Agreements necessary for the administration of the Funds, and ratifies the actions taken by the Fund Trustees within the scope of their authority.

The collective bargaining agreements also provide a grievance-arbitration mechanism "should differences arise between the Company and the Union or any employee of the Company as to the meaning or application of the provisions of the Agreement." This mechanism gives the Union the discretion to invoke the grievance-arbitration procedures provided by the agreements, to do nothing, or to use its economic power five days after giving written notice to the employer.

With the exception of the 1979-1982 Collective Bargaining Agreement with Prosser, the agreements do not give the employers the right to invoke the grievance-arbitration procedures in the event of a dispute involving the Funds. The 1979-1982 Collective Bargaining Agreement with Prosser does allow Prosser to request arbitration. In such circumstances, the Union must submit to arbitration and may not resort to economic action unless the dispute to be arbitrated involves Prosser's failure to make contributions to the Funds.

By executing the Participation Agreements, Prosser and Schneider agreed to make contributions to the Pension Fund as required by the collective bargaining agreements. Appellees also agreed to abide by the terms of the Pension Fund Trust Agreement, and to abide by the rules and regulations adopted by the Trustees of the Fund, and by the actions of the Trustees in administering the Fund in accordance with the rules and with the Pension Fund Trust Agreement.

By executing the Joint Application, Schneider made essentially the same agreements with respect to the Health and Welfare Fund.[1]

The Trust Agreements require the employers to remit payments to the Funds in accordance with the terms of the collective bargaining agreements. Among other things, the Trust Agreements authorize the Trustees to promulgate such rules as are necessary to facilitate proper administration of the Funds, to demand and collect employer contributions, and to enforce

---

[1] It does not appear that Prosser executed a Joint Application. Prosser concedes, however, that the two trust indentures were incorporated by reference into the collective bargaining agreements that it executed, and that by executing the collective bargaining agreements it had agreed to ratify the actions of the Trustees of the Funds if such actions are within the scope of their authority under the Trust Agreement.

payment of such contributions by taking whatever steps are necessary, including the institution of legal actions, to collect contributions which may be owed to the Funds. The agreements also authorize the Trustees, by their representatives, to examine the employer's records if such examinations are deemed necessary in connection with the proper administration of the Funds.

We observe initially that the collective bargaining agreements provide for arbitration "should differences arise between the Company and the Union or an Employee of the Company." This provision, when read in connection with the Trust Agreement provision which authorizes the Trustees to institute legal actions in order to enforce payment of amounts which may be owed to the Funds, seems to indicate that the parties did not contemplate that the Trustees are required to resort to the grievance-arbitration procedures delineated in the collective bargaining agreements in all cases.[2]

---

[2] Appellees argue that by executing the collective bargaining agreements, they authorized only the execution of Trust Agreements necessary to the *administraton* of the Funds. According to this argument, the filing of these claims by the Trustees cannot be properly characterized as a matter of Fund administration, and, consequently, the Trustees' actions are not within the scope of their powers as authorized in the collective bargaining agreements.

This argument is questionable. One cannot seriously contend that the determination of amounts owed to a trust fund is not a matter of trust administration. To the contrary, a trustee may be held to be in breach of his fiduciary duty to a trust if he is not diligent in determining the amounts so owed.

Given that the power to determine the amounts owed to a trust fund is a proper incident of trust administration, the ability to institute legal proceedings to enforce payments of amounts that may be owed would appear to be a necessary concomitant of that power.

This does not, however, necessarily mean that the Trustees' decision as to amounts owed and coverage are dispositive and we do not so decide.

We think this conclusion comports with national labor policy. As the Supreme Court has noted,

> [t]he duties of [a] . . . trustee of an employee benefit trust fund, under § 302(c)(5) of the Act, under principles long ago developed in the courts of chancery, and under the specific provisions of ERISA, are totally alien to . . . [the] activities [of collective bargaining and the adjustment of grievances].

*NLRB* v. *Amax Coal Co.*, 101 S. Ct. 2789, 2798-99 (1981). *See Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459 (1960), wherein the Supreme Court held that the trustees of a fund established under a collective bargaining agreement are not typical third-party beneficiaries of such agreements, and thus are not necessarily subject to the same duties which would normally attach to such beneficiaries.

In addition, the Trustees should not be required to ask the Union to arbitrate this dispute. Such a requirement would, in our opinion, tend to undermine the independence of the Funds from Union control.

> Congress directed that union welfare funds be established as written formal trusts, and that the assets of the funds be "held in trust" . . . . Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with "uncompromising rigidity."

*NLRB* v. *Amax Coal Co.*, 101 S. Ct. at 2794 (citations omitted).

> Congress, in enacting Section 302 of the Labor Management Relations Act (29 U.S.C. § 186) intended that Welfare and Pension Funds established in accordance with that section would be independent of exclusive control by

the union. Consequently, the failure of an employer to make contributions as required by an agreement is not an arbitrable dispute in the absence of a specific provision in the agreement requiring the Trustees to submit their claims to the arbitration procedure.

Since the Welfare Fund in the instant action was established in accordance with 29 U.S.C. § 186, it is the opinion of this Court that dismissal of the instant action in order to permit the union and the employers to arbitrate the right of the Trustees would be contrary to the intent of Congress in establishing independent Welfare Funds. If the parties to the collective bargaining agreement (the employers and the union) intended that claims for unpaid contributions to the Welfare Fund should be subject to the arbitration provision of the agreement, they should have so stated in unequivocal language.

*Wishnick* v. *One Stop Food & Liquor Store, Inc.*, 359 F. Supp. 239, 243 (N.D. Ill. 1973), *cited in Todd* v. *Casemakers, Inc.*, 425 F. Supp. 1375, 1378 (N.D. Ill. 1977). *But see Central States Southeast and Southwest Areas Pension Fund* v. *Howard Martin, Inc.*, 625 F.2d 171 (7th Cir. 1980).[3]

---

[3] In *Howard Martin*, the Seventh Circuit held that simple collection claims need not be submitted to arbitration. That court nevertheless found that arbitration was required because the underlying dispute was characterized as turning on which, if any, of the disputed workers were covered by the collective bargaining agreement. In such circumstances, the dispute was deemed appropriate for arbitration notwithstanding the necessity that the Trustees rely on the Union to trigger the arbitration process. Such reliance was not deemed by the Seventh Circuit to be a significant impediment to the Trustees' independence or to the Trustees' ability to have the dispute resolved. 625 F.2d at 173. *See also Trustees of National Benefit Fund for Hospital and Health Care Employees* v. *Constant Care Community Center*, ____ F.2d ____ (4th Cir. 1982).

We are aware that our allowing the district court to interpret the provisions of the collective bargaining agreements might, as appellees suggest, lead to a lack of uniformity in interpretation of the bargaining agreements. We are of the opinion, however, that such a danger would be minimal. The district court is, of course, not precluded from considering the reasoning of an arbitration panel that has previously interpreted provisions which are similar to the ones involved here. We feel that this danger, to the extent that it exists, is outweighed by the possibility that the Union might not be diligent in arguing the Trustees' position during arbitration. This possibility could arise, for example, as a result of a conflict between the duty that the Union has assumed by agreeing to arbitrate the Trustees' claims and its duty towards the employees whose other rights might be imperiled by vigorous enforcement of the Trustees' claims. *See Nedd* v. *United Mine Workers of America*, 556 F.2d 190, 210 (3d Cir. 1977). The possibility could also arise where, as is the case with Schneider, the Union no longer represents the covered employees.

In sum, "the national labor policy becomes an important consideration in determining whether the same inferences which might be drawn as to other third-party agreements should be drawn here." *Lewis* v. *Benedict Coal Corp.*, 361 U.S. at 470. As we have previously noted, moreover, Section 302 of the LMRA expreses the intent of Congress to establish and maintain the independence of Welfare Funds. Therefore, in accordance with the rationale of *Lewis* v. *Benedict Coal Corp., supra,* and *NLRB* v. *Amax Coal Co., supra,* we hold that the Trustees should not be obliged to arbitrate these disputes through the Union in the absence of express language to the contrary appearing in the collective bargaining or trust agreements. *See Owen* v. *One Stop Food & Liquor Store, Inc.*, 359 F. Supp. 243, 246-47 (N.D. Ill. 1973); *Boyle* v. *North Atlantic Coal Corp.*, 381 F. Supp. 1107, 1108 (W.D. Pa. 1971). *But see IBEW* v. *Dave's Electric Service, Inc.*, 382 F. Supp. 427, 430-33 (M.D. Fla. 1974).

We have examined the remaining issues presented by the Trustees, and find that they are either meritless or not properly before us. Accordingly, the orders of the district court are reversed, and these cases are remanded for further proceedings consistent with this opinion.

HENLEY, Circuit Judge, dissenting.

With all deference to considerations which have impelled the majority toward reversal, I reach a different result.

This case, not unlike *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 101 S.Ct. 1437, 1442 (1981), involves a tension between two aspects of national labor policy.[1] Because I find it clear that arbitration here would promote the national labor policies of maintaining industrial peace, avoiding delay, and deferring to the expertise of persons well acquainted with the standards of the industry and the law of the shop, and because I think deferral to arbitration would not significantly undermine the independence of the Trustees, I would affirm the judgment of the district court.

Although, to be sure, the LMRA and ERISA reflect a Congressional intent to maintain the independence of Welfare and Pension Funds such as those involved here, there also exists a strong public policy favoring labor arbitration, *see, e.g., United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593

---

[1] In *Barrentine*, the "tension" was between the policy encouraging negotiation and collective bargaining and the national policy, expressed in the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, which guarantees employees specific substantive rights. 101 S.Ct. at 1441. The underlying dispute here does not involve substantive statutory rights, but rather, the Trustees' right to receive employer contributions. This right to contributions arises solely from the provisions of the collective bargaining agreements, and not from those statutes dealing with the independence of trustees or the Fund. Thus, *Barrentine* may be distinguished.

(1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *Trustees of national Benefit Fund for Hospital and Health Care Employees* v. *Constant Care Community Health Center, Inc.*, No. 81-1210, slip op. at 4-5 (4th Cir. Jan. 28, 1982); *I.B.E.W.* v. *Dave's Electric Service, Inc.*, 382 F. Supp. 427, 430-33 (M.D. Fla. 1974), and arbitrability is ordinarily to be presumed when the parties' dispute arises out of the collective bargaining process. *See Barrentine* v. *Arkansas-Best Freight System, Inc.*, 101 S.Ct. at 1442, and the cases cited therein. *See also I.B.E.W.* v. *Dave's Electric Service, Inc.*, 382 F.Supp. at 430-31.

Where the underlying dispute involves mere collection matters not requiring an interpretation of the terms of collective bargaining agreements, then the policies justifying deferral to arbitration would not be served by such deferral, and arbitration should not be deemed a prerequisite to the Trustees' ability to litigate the dispute in the federal courts. However, where the underlying dispute involves an interpretation of the terms of the collective bargaining agreements authorizing payment of monies to the Funds, labor policy would best be served by requiring arbitration. *Trustees of National Benefit Fund for Hospital and Health Care Employees* v. *Constant Care Community Health Center, Inc., supra; Central States, Southeast and Southwest Areas Pension Fund* v. *Howard Martin, Inc.*, 625 F.2d 171 (1980).

As has been observed, the underlying dispute here involves the interpretation of the term "covered employees," a term defined in the collective bargaining agreements only, and not in any of the ancillary agreements. Furthermore, the parties to the agreements have gone to the trouble of outlining detailed procedures to resolve disputes "as to the meaning or application of the provisions of the Agreement[s]." One need not be clairvoyant to foresee that the spirit of negotiation and compromise

that forms the basis for such agreements might be seriously compromised if the parties become aware that the terms of the agreements might be safely ignored or interpreted initially other than through the arbitration machinery.[2]

Furthermore, with respect to considerations of expedition and efficiency, litigation cannot be said to be superior to arbitration. The issue before us now does not go to the merits of the underlying dispute, and, while I do not deny the importance of this issue, I nevertheless observe that its resolution has already operated to delay resolution on the basic dispute by many months.

The majority is disturbed by the fact that arbitration would require the Trustees to rely on the Union to present their arguments. It is said that the independence of the Trustees would be impermissibly undermined if they are to be required to request such assistance.

I think, however, that the independence of the Trustees is already adequately protected by the mandates of the LMRA and ERISA. This case does not involve a situation such as that present in *Nedd* v. *United Mine Workers of America*, 556 F.2d 190 (3d Cir. 1977), which involved the failure of the Trustees of an admittedly Union dominated employee benefit fund to enforce contractual rights of the fund, where such enforcement was clearly contrary to the interests of the Union. Rather, this case involves employee benefit funds whose independcence has already been assured through Section 302(c)(5) of the LMRA. While these Funds should, of course, seek to guard their in-

---

[2] The underlying dispute involves the classification of temporary and part time workers in an industry which is apparently somewhat seasonal in nature, and which is arguably subject to varying degrees of employment demands at different times during a given season. Resolution of this dispute thus seems uniquely suited to the use of the expertise of an arbitrator having knowledge of the industry.

dependence, their efforts should not necessarily be given effect where the perceived threat to their independence is both hypothetical and unlikely. I find remote the possibility that deferral to the Union for arbitration purposes would actually tend to undermine the independence of the Funds. *Cf. Amalgamated Local No. 55, United Automobile, Aerospace & Agricultural Implement Workers of America* v. *Metal and Alloy Division of Silver Creek Precision Corp.*, 396 F. Supp. 667 (W.D. N.Y. 1975).[3]

Finally, it bears noting that jurisdiction was not forever barred by the district court; rather, it was deferred. In the unlikely event that arbitration is unsatisfactory, the Trustees again may seek appropriate relief by way of litigation.

As stated, I would affirm.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

---

[3] In that case, a Union, rather than the Trustees, used the arbitration mechanism provided by a collective bargaining agreement to seek enforcement of the employer's obligation to contribute to a benefit fund. The issue of the independence of the Trustees of the Fund was not raised, presumably because no threat to their independence was perceived.

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

---

Cause No. 80-0379-C(B)

---

Loran W. Robbins, et al.,

Plaintiffs,

vs.

Prosser's Moving and Storage Company, Inc.,

Defendant.

### NOTICE OF APPEAL

(Filed November 25, 1980)

NOTICE is hereby given that Loran W. Robbins, Marion M. Winstead, Harold J. Yates, Robert J. Baker, Howard McDougall, Thomas F. O'Malley and R. V. Pulliam, Trustees of the Central States, Southeast and Southwest Areas Pension Fund, the Plaintiffs above-named appeal to the United States Court of Appeals for the Eighth Circuit from the Order sustaining Defendant's Motion to Dismiss entered in this action on the seventh day of November, 1980; and from the Order dismissing Plaintiffs' cause of action without prejudice pending the outcome of arbitration proceedings entered in this action on the seventh day of November, 1980.

LaTOURETTE AND WEYERICH

/s/ Donald J. Weyerich #20191
11 South Meramec - Suite 1400
Clayton, Missouri 63105
727-0777

Attorney for Plaintiffs

## APPENDIX F

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

---

No. 80-379C (B)

---

Loran W. Robbins, et al.,

Plaintiffs,

vs.

Prosser's Moving and Storage Company,
a Missouri corporation,

Defendant.

### MEMORANDUM

(Filed November 7, 1980)

In this action, the trustees of two separate and independent trusts, as alleged third-party beneficiaries, have joined in a single count their separate claims alleging that defendant has violated the terms of two consecutive three year collective bargaining agreements, commencing March 1, 1976, as well as certain provisions of their separate industry Trust Agreements.

In substance, it is alleged in Paragraph 9 of the complaint that "(b)y virtue of [unspecified] provisions contained in the Collective Bargaining Agreements", defendant agreed, inter alia, to furnish to the trustees of each of said Funds a monthly contribution report. In Paragraph 10 of the complaint, it is alleged in general terms that "(p)ursuant to [unspecified] provisions contained in the Collective Bargaining Agreement *and* Health and Welfare *and* Pension Trust Agreements, the Trustees acting thereunder are authorized and empowered to examine and copy the payroll books and records of an Employer," with certain

alleged consequences if "upon an audit made by the Trustees and/or upon other evidence it shall be found that an Employer had failed to make all contributions required of said employer. Paragraph 11 alleges that defendant has violated said obligations on its part by failing to allow the Trustees "to make *proper* audit of Defendant's payroll books and records "and by failing to make the required monthly contribution reports." Plaintiffs seek specific performance of all of defendant's obligations required under all the agreements, including certain participation agreements.

By pleading their claims in one count in the foregoing manner, plaintiffs have made it extremely difficult, if not impossible, to ascertain which provision of which Agreement has allegedly been violated by defendant as to each set of plaintiff trustees. Adding to this problem, although not adverted to in the complaint, is the fact that although both claims have their genesis in the same collective bargaining agreements, the provisions relating to each Fund and contributions thereto are set forth separately, each being completely independent of the other. So, too, each of the Trust Agreements is entirely independent of and wholly unrelated to the other. We note that without regard to the foregoing, plaintiffs served a request for admissions which, inter alia, requested defendant to admit that by the execution in March, 1961, of a so-called "Participation Agreement" which was expressly limited to the *Pension Fund* and the *Pension Trust Agreements* defendant agreed to be bound by the terms of *Health and Welfare* Trust Agreements.

Defendant has not raised the point of misjoinder of parties, but under the rules we may consider it sua sponte. Rule 20(a) authorizes joinder of parties if two prerequisites are met: (1) the claims of each must arise out of the same transaction or occurrence or series of transactions or occurrences, and (2) if any question of law or fact common to all such parties will arise in the action. Plaintiffs concede that each set of plaintiffs is a separate independent entity bringing a separate claim, but argue

that their rights arise out of the same transactions or occurrences, namely, the collective bargaining agreements. We do not agree.

As noted *supra,* the rights of each set of trustees are created by the same instruments. However, each of the collective bargaining agreements is actually a mere umbrella contract containing a number of separate agreements. Each set of plaintiffs is a third-party beneficiary of only one of these separate agreements. The situation here is wholly unlike that in *Mosely* v. *General Motors Corporation,* 8 Cir. 1974, 497 F.2d 1330 relied on by plaintiffs. What *Mosely* holds is that "all 'logically related' events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence." Here, there is no logical relationship between the separate, independent agreements to make contributions to each Fund nor are the claims of each set of Trustees based on alleged breaches of the separate independent agreements reasonably (and legally) related to each other. However, unless and until defendant moves to drop one of the parties, we will not order such action. Nevertheless, because of the inherent confusion resulting from the manner of pleading, the claim of each plaintiff should have been separately stated in separate counts in each of which the specific provision or provisons of each of the pleaded documents relied on is clearly alleged.

Each of the collective bargaining agreements provides that the employer shall contribute to the Health and Welfare Fund a specified sum for each employee covered by the agreement, and further provides that the contribution be made each week on each *regular* employee. Comparably, it is provided that the employer shall contribute a specified sum per week for each *regular* employee covered by the agreement, if he performs 25 hours of work in the week, with part-time, temporary and emergency employees expressly excluded from coverage.

In this connection, we note that each of the collective bargaining agreements provides that a list or roster of regular employees (with the dates of their employment) shall be displayed on the employer's bulletin board at all times. It is thus obvious that the union will be aware at all times of who the employer considers to be its regular employees, so that it can utilize the grievance procedures if it disputes the accuracy of the list. In addition, each of the contracts contains an agreement to make available (to the Union) for inspection, within 5 days after written request, its payroll records with respect to any employee covered by the agreement about whom a specific grievance has been filed, as well as a further agreement to open its payroll records *with respect to the employees covered therein,* "when the union by an independent audit have (sic) reason to believe that the contract has or is being violated." There is no other provisions for inspecting the employer's records.

The agreements also contain provisions whereby (as to each fund) the employer authorizes the Employers' Association, parties to such fund, "to enter into appropriate trust agreements necessary for the *administration* of [that] fund." The trust agreements each contain provisions whereby each employer is required to forward to the trustees certain information, such as the names and addresses of its employees and the hours worked by each, and purports to authorize the trustees to examine the pertinent records of each employer at the employer's place of business "whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust." Whether this provision is permissible is itself dependent upon a construction of the terms of the collective bargaining agreements.

Defendant has moved to dismiss the action on the ground, inter alia, that the controversy should have been submitted to arbitration. The dispute involves the construction and interpretation of the language of the collective bargaining agreements as to which class of employees are covered thereunder and as to the

right of each set of plaintiffs to obtain a court-ordered accounting and audit. Plaintiffs argue that as third-party beneficiaries they are not bound by the grievance-arbitration procedures contained in the collective bargaining agreements. For reasons stated in our MEMORANDUM dated November 7, 1980 filed in *Robbins* v. *Schneider Moving & Storage Company*, Cause No. 80-535C(B), a copy of which is attached hereto, we hold that unless and until there has been a determination of the disputes relating to the rights of plaintiffs and the nature and extent of defendant's obligations under the collective bargaining agreement, plaintiffs have no standing to sue as alleged third-party beneficiaries.

It follows from the foregoing that defendant's motion to dismiss should be and it is hereby sustained. An order will be entered dismissing the case without prejudice pending the outcome of arbitration proceedings.

Dated this 7th day of November, 1980.

/s/ John K. Regan
UNITED STATES DISTRICT
JUDGE

## APPENDIX G

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

---

No. 80-535C (B)

---

Loran W. Robbins, et al.,
Plaintiffs,

vs.

Schneider Moving and Storage Company, Inc.,
Defendant.

### MEMORANDUM

(Filed November 7, 1980)

In this action, the trustees of two separate and independent trusts, as alleged third-party beneficiaries, have joined in a single count their separate claims alleging that defendant has violated the terms of three consecutive three-year collective bargaining agreements, commencing March 1, 1970, as well as certain provisions of their separate industry Trust Agreements.

In substance, it is alleged in Paragraph 10 of the complaint that "(b)y virtue of [unspecified] provisions contained in the Collective Bargaining Agreements", defendant agreed, inter alia, to furnish to the trustees of each of said Funds a monthly contribution report. In Paragraph 11 of the complaint, it is alleged in general terms that "(p)ursuant to [unspecified] provisions contained in the Collective Bargaining Agreement *and* Health and Welfare *and* Pension Trust Agreements, the Trustees acting thereunder are authorized and empowered to examine and copy the payroll books and records of an

Employer", with certain alleged consequences if "upon an audit made by the Trustees and/or upon other evidence it shall be found that an Employer had failed to make all contributions required" of said employer. Paragraph 12 alleges that defendant has violated said obligations on its part by failing to allow the Trustees "to make *proper* audit of Defendant's payroll books and records" and by failing to make the required monthly contribution reports. Plaintiffs seek specific performance of all of defendant's obligations required under all the agreements, including certain participation agreements.

By pleading their claims in one count in the foregoing manner, plaintiffs have made it extremely difficult, if not impossible, to ascertain which provision of which Agreement has allegedly been violated by defendant as to each set of plaintiff trustees. Adding to this problem, although not adverted to in the complaint, is the fact that although both claims have their genesis in the same collective bargaining agreements, the provisions relating to each Fund and contributions thereto are set forth separately, each being completely independent of the other. So, too, each of the Trust Agreements is entirely independent of and wholly unrelated to the other. We also note that without regard to the foregoing, plaintiffs have served a request for admissions which, inter alia, requested defendant to admit that by the execution in March, 1961, of a so-called "Participation Agreement" which was expressly limited ot the *Pension Fund* and the *Pension Trust Agreements* defendant also agreed to be bound by the terms of the *Health and Welfare* Trust Agreements.

Defendant has moved to dismiss the action, contending that the controversy should have been submitted to arbitration. Plaintiffs argue that as third-party beneficiaries as distinguished from signatories to the Collective Bargaining Agreements they are not bound by the grievance-arbitration procedures which would be required of the union with respect to the resolution of differences.

This issue has been addressed in several cases, most recently in *Central States Southeast and Southwest Areas Pension Fund* v. *Martin*, ____ F.2d ____, 104 LRRM 3096, decided by the Court of Appeals for the Seventh Circuit on July 9, 1980, discussed infra. Plaintiffs cite some earlier district court decisions in Illinois and one in Pennsylvania (e.g. *Todd* v. *Caseworkers*, 425 F. Supp. 1375) to the effect that where the only dispute relates to how much of the required contribution is delinquent, the pension plan trustees as third-party beneficiaries are not bound to submit the dispute to arbitration. In those cases the resolution of the dispute was not dependant on the construction or interpretation of the language contained in the collective bargaining agreement. We agree that where, as in *Todd*, the action is no more than a simple collection proceeding with only the amount of the delinquency in issue, the third-party beneficiary is not required to arbitrate such dispute.

Of importance is the fact that the present is *not* a simple collection case. To the contrary, defendant points out, and plaintiffs have not denied, that whether defendant will ultimately be held liable to either or both Funds is dependent upon a construction and interpretation of the language of the collective bargaining agreements. It was on this basis that *Martin, supra*, was decided. In holding that the dispute should be submitted to arbitration, Judge Markey, for the Seventh Circuit, noted that inasmuch as the case turned on which, if any, of the disputed workers were covered by the contract, it would be impossible to determine whether there was, in fact, a delinquency on which to base a collection action.

Plaintiffs rely on *Lewis* v. *Benedict Coal Corp.*, 36 U.S. 459 (1960) which held that a collective bargaining agreement establishing a welfare fund is not a typical third-party beneficiary contract, and on that basis ruled that the employer could not set off against its admitted liability to the fund the damages it sustained by reason of the *union's* breach of a no-strike agreement. No such situation is here present.

On the contrary, the issue here is simply whether the employer is liable at all *under the terms of the collective bargaining agreements.* If, upon a proper construction and interpretation of the agreements, the defendant has not agreed to make contributions on behalf of certain classes of employees, the argument that plaintiffs, as third-party beneficiaries, may attempt to collect on behalf of those employees begs the question. Surely, plaintiffs are not entitled to contributions which the employer has not agreed to make under the collective bargaining agreements. They are third-party beneficiaries *only* to the extent set forth in such agreements. In truth, the underlying controversy as to which employees are covered by the contract is actually with the *union,* and the union should not be permitted by the expedient of remaining out of the litigation, preclude the employer from obtaining a determination, through arbitration, of the proper construction of the contract language.[1]

We hold that the controversy as to the construction or interpretation of the contract language must first be submitted to arbitration. Unless that issue is resolved adversely to the employer, plaintiffs may not maintain this action on the theory they are third-party beneficiaries. Should there be any problem respecting the right of the trustees to independently invoke the arbitration provisions, the procedure suggested by *Martin* should be followed, namely, that the Trustees request the union to file a grievance and thus trigger the arbitration process.

---

[1] Significantly, although the collective bargaining agreements expressly provide that a failure by the employer to pay the required contributions shall constitute a breach of the agreements, the union has taken no action. A wilful violation of such agreement, uncured after 5 days notice, entitles the union to use its economic power to enforce the contract. We further note that the agreements obligated the employer to post a list of its regular employees, so that if the union were to question the adequacy thereof, the dispute here involved would long since have been resolved by arbitration.

To make our ruling unmistakably clear - we do *not* hold that *mere* collection matters should be subject to arbitration. We add that in the event the trustees are uncertain as to whether a particular claim is a mere collection matter or one which involves a dispute as to the construction or interpretation of the language of the collective bargaining agreement, they should, before instituting suit, obtain the requisite information from the union and the employer.

It follows from the foregoing that defendant's motion to dismiss should be and it is hereby sustained. An order will be entered dismissing the case without prejudice pending the outcome of arbitration proceedings.

Dated this 7th day of November, 1980.

/s/ JOHN K. REGAN
UNITED STATES DISTRICT
JUDGE

---

**ORDER OF DISMISSAL**

The Court having this day entered its MEMORANDUM herein, NOW THEREFORE in accordance therewith and for the reasons therein stated,

IT IS HEREBY ORDERED that this action be and the same is hereby DISMISSED WITHOUT PREJUDICE.

Dated this 7th day of November, 1980.

/s/ JOHN K. REGAN
UNITED STATES DISTRTICT
JUDGE

## APPENDIX H

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-379C (B)

Loran W. Robbins, et al.,
Plaintiffs,

vs.

Prosser's Moving and Storage Company,
a Missouri corporation,
Defendant.

### ORDER OF DISMISSAL

(Filed November 7, 1980)

The Court having this day entered its MEMORANDUM herein, NOW THEREFORE in accordance therewith and for the reasons therein stated,

IT IS HEREBY ORDERED that this action be and the same is hereby DISMISSED WITHOUT PREJUDICE.

Dated this 7th day of November, 1980.

/s/ John K. Regan
UNITED STATES DISTRICT
JUDGE